11-2404-12690-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY
ALCOHOL & GAMBLING ENFORCEMENT DIVISION

In the Matter of the Distributor License of Kent Anderson d/b/a Midwest Slot Machine Co.	**RULING REGARDING MOTION TO EXTEND DEADLINES AND COMPEL DISCOVERY**

The above-entitled matter is pending before the undersigned Administrative Law Judge pursuant to a Notice of and Order for Prehearing and Order to Show Cause filed on January 14, 2000. E. Joseph Newton, Assistant Attorney General, Suite 200, 525 Park Street, St. Paul, MN 55103-2106, appeared on behalf of the Minnesota Department of Public Safety, Alcohol & Gambling Enforcement Division ("A&GED"). Joseph A. Rymanowski, Jr., Attorney at Law, P.O. Box 16446, St. Paul, Minnesota 55116, appeared on behalf of the Licensee, Kent Anderson d/b/a Midwest Slot Machine Co. The Licensee filed a Motion to Extend Deadlines and Compel Discovery on May 30, 2000. The A&GED filed a response in opposition to the motion on June 1, 2000. The Licensee filed a reply brief with respect to the motion on June 5, 2000.

Based on all of the arguments, proceedings, and records in this matter, and for the reasons discussed in the attached Memorandum,

IT IS HEREBY ORDERED as follows:

1. The Licensee's motion to extend discovery deadlines is GRANTED. The discovery period will be extended to June 23. The First Prehearing Order is amended to reflect this new discovery deadline.

2. The Licensee's discovery requests to the A&GED will be permitted. The A&GED is directed to respond to the requests by June 23, 2000. If any particular request is viewed by the A&GED as overbroad, irrelevant, or requesting privileged material, the A&GED shall note its objection but thereafter respond to the request to the extent possible (i.e, define a relevant time period and supply information relating to that period; limit the response to areas agreed to be relevant; and provide non-privileged information responsive to the requests).

3. The Licensee's Motion to Compel is DENIED because it is not ripe for consideration at the present time. If the Licensee wishes to file a Motion to Compel concerning the A&GED responses due on June 23, 2000, he must do so

by June 26. The response of the A&GED to any such motion shall be filed by June 29, and an expedited decision shall be issued.

Dated: June 13, 2000

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

In this 524-count contested case proceeding, the A&GED alleges that the Licensee, Kent Anderson d/b/a Midwest Slot Machine Co., sold more gambling devices than allowed under his license in 1994-98 and improperly sold devices that were less than five years old in 1994-98. The prehearing conference originally scheduled for February 15, 2000, was continued to March 7, 2000, at the request of Licensee's counsel, because he needed to travel to Korea to pick up a child whom he was adopting. During the prehearing conference held on March 7, counsel for both parties agreed to a 45-day discovery period and a summary disposition briefing schedule based upon their belief that the facts were not in issue and the matter would be appropriately decided on cross motions for summary disposition. The First Prehearing Order issued by the Administrative Law Judge on March 14, 2000, directed that all discovery be completed by April 21, simultaneous cross-motions for summary disposition be filed by May 5, simultaneous reply briefs be filed by May 12, and oral argument be heard on May 24.

Counsel for the Licensee called counsel for the A&GED a short time before the expiration of the discovery period and asked to conduct interviews of two state witnesses a few days after the deadline.[1] Counsel for the A&GED objected to the interviews, and they did not occur. Shortly after the April 21 discovery deadline, counsel for the Licensee also asked that he be permitted to review the non-privileged materials contained in A&GED's file. This request was also denied.

[1] The exact timing is unclear from the motion papers. Counsel for the Licensee asserts in Memorandum in Support of Motion at 7 that he contacted counsel for the A&GED three days prior to the discovery deadline to request the interviews and that counsel for the A&GED refused to give a one-day extension outside the deadlines to take the interviews. In Licensee's counsel's letter to A&GED counsel dated April 21, 2000 (attached to the memorandum as Ex. 1), however, counsel for the Licensee indicated that he contacted counsel for the A&GED two days before the discovery deadline and proposed to meet to exchange documents and conduct the interviews four days after the deadline. Finally, in Licensee's reply brief at 6, the Licensee's counsel asserts that he attempted to set up the interviews three days prior to the expiration of the discovery deadline to occur two days after the expiration of the deadline.

At the request of counsel for the Licensee, a telephone conference call between the Administrative Law Judge and counsel for the parties was held on May 2, 2000. Counsel for the Licensee proposed that an additional 4½-month discovery period be allowed as to counts 482-524 followed by a hearing, and that cross-motions for summary disposition dispose of the remainder of the counts. He stated that the additional time was necessary to determine whether the required manufacture date stamps were missing from the 43 machines sold by the Licensee that are involved in counts 482-524. He indicated that he had been under the mistaken impression at the time of the first prehearing conference that both parties agreed to all material facts and had only recently become aware of the Licensee's possible defense concerning these counts. If he had known of the factual dispute, he stated that he would have asked for a six-month discovery period at the initial prehearing conference, in order to allow him adequate time to locate the 43 machines, some of which were sold by the Licensee six years ago and since resold to others. Counsel for the A&GED objected to the requested continuance, stressing that the Licensee had not attempted to conduct any discovery until just prior to the deadline. He further indicated that he did not plan to move for summary disposition as to any of the counts due to the inadequacy/tardiness of the Licensee's discovery responses (although he did not wish to file a motion to compel), and urged that the May 24 oral argument date be used as a hearing date. Counsel for the Licensee disputed the A&GED's claim that his discovery responses were inadequate or untimely. Written argument was received from both counsel prior to the conference call, and oral argument was heard during the call.

At the conclusion of the May 2 conference call, the Administrative Law Judge ruled that the parties should exchange proposed stipulations of fact by May 17 and file any executed stipulation by May 23. The Judge also ordered that the May 24 oral argument date would be converted to a status conference to discuss the parties' progress toward reaching a factual stipulation, find out where the Licensee's search for the 43 machines stood, and set a hearing date or briefing schedule. By letter dated May 10, 2000, the Administrative Law Judge confirmed the discussions during the May 2 conference call and ruled that the First Prehearing Order should be modified as follows: (1) because neither party intended to file a motion for summary disposition, the briefing schedule and oral argument on the anticipated motions was cancelled; and (2) a status conference was scheduled for May 24, at which time the Licensee was expected to provide an up-date regarding the status of his efforts to find out more about the machines involved in certain counts of the proceeding and the parties and Judge were expected to set a hearing date and/or briefing schedule.

The Administrative Law Judge did not intend by this ruling to reopen the discovery period between the parties. In fact, the Judge did not understand that the Licensee was requesting a reopening of the discovery period between the parties. While counsel for the Licensee generally requested in his May 2 letter to the Judge "a six (6) months continuance of only Counts 482-524 so that additional discovery can be afforded" and while some of the attached correspondence referenced the A&GED's refusal to extend the discovery period,

the attachments also included a letter dated April 21, 2000, to counsel for the A&GED in which the Licensee's counsel concluded by stating, "I would like to extend the discovery on these counts for six (6) months, *so that the manufacturers can be made to testify, and the actual machines found*." (Emphasis added.) Moreover, during the May 2 conference call, counsel for the Licensee merely stressed the need to obtain additional discovery with respect to third parties (i.e., the owners of the 43 machines). During the conference call, when the Administrative Law Judge pointed out that a six-month discovery period would be unusual in an administrative hearing, counsel for the Licensee responded by saying, "I'm not doing discovery against the state though. I'm trying to get persons who are not parties to cooperate with my investigation efforts. That's the only reason."[2] Accordingly, the Judge did not get the impression during the conference call that the Licensee was requesting that the discovery period between the parties be reopened, but believed that the Licensee simply wanted additional time prior to the hearing in which to locate the machines and obtain information concerning them from their current owners.

On May 12, 2000, the Licensee served interrogatories, document requests, and requests for admissions on the A&GED. The Licensee also submitted proposed stipulations of fact to the A&GED in preparation for the hearing. The A&GED notified the Licensee by letter dated May 22 that it believed that these discovery requests were untimely since the discovery deadline established by the First Prehearing Order had passed. Shortly before the May 24 status conference, counsel for the Licensee informed the Administrative Law Judge and opposing counsel that he wished to discuss the A&GED's refusal to respond to discovery during that conference.

At the time of the May 24 conference, the Licensee indicated that he had made significant progress in finding the machines and had located most of them. Counsel for the A&GED stated that a proposed stipulation had been received from the Licensee, the parties were "fairly close" regarding the stipulation, and he thought that the A&GED could stipulate to the fact that the dates were not imprinted on the machines, but had to examine that issue more closely. After discussion with the parties, a July 10 hearing date was set. The A&GED was ordered to respond to the Licensee's proposed stipulation by June 2 and the parties were ordered to finalize their stipulation by June 14 and submit it to the Administrative Law Judge by June 16. Counsel for the Licensee indicated that he believed that the Judge's earlier ruling expanded the time for discovery, and requested that the A&GED be ordered to respond to his discovery requests. Counsel for the A&GED continued to express the view that the time for discovery had passed and the deadline had not been extended by the Judge. After some discussion at the May 24 prehearing conference, counsel for the Licensee was asked to put his motion in writing[3] and a briefing schedule was established.

---

[2] *See* Tape Recording of May 2, 2000, telephone conference call.

[3] Pursuant to the rules of the Office of Administrative Hearings, "[a]ny application to the judge for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall

In his motion, the Licensee requests that the discovery deadlines be extended a short period of time to obtain the Licensee to obtain limited discovery from the A&GED (i.e., responses to the discovery requests already served by the Licensee). The Licensee asserts that he did not know that the A&GED accused the Licensee of making no reasonable efforts to learn the dates of manufacture of the machines until he received a letter from counsel for the A&GED dated May 22, 2000, and stresses that it is not clear whether the A&GED is willing to stipulate that all of the machines in question lacked date and time manufacture stamps.[4] The Licensee contends that this matter "has turned into an actual evidentiary hearing on 524 counts, a significantly greater burden than was anticipated by anyone" and that the parties must be more thorough in preparing for an evidentiary hearing than for a motion for summary disposition.

Applying *Cotroneo v. Pilney*,[5] the Licensee argues that he is at risk for a grave amount of prejudice because this case is now set on for evidentiary hearing and he faces the loss of his livelihood, a fine, and a potential criminal prosecution if his license is revoked; the State can show no prejudice stemming from an expanded discovery period except loss of tactical advantage; any modification to the discovery period will not have an impact because the hearing will remain scheduled for July 10 and, if discovery is ordered to be completed on an expedited basis, the A&GED will have ample opportunity to prepare for the hearing; and the Licensee has been diligent in seeking discovery since counsel for the A&GED asserted that the entire matter must be tried apart from summary disposition motions. The Licensee's counsel states that he made a conscious tactical decision not to conduct discovery in preparation for summary disposition because he was under the impression that the parties had an understanding as to what facts were at issue. The Licensee argues that it is important for him to learn of potentially exculpatory evidence, potential rebuttal witnesses, and the identity of persons talked to by the A&GED in investigating or preparing for its case, and thereby gain information that may be used to question the credibility of the State's witnesses. In addition, the Licensee points out that, despite assurances from counsel for the A&GED that the parties would be able to enter into a stipulation of fact, they have not yet done so.

In *Cotroneo v. Pilney*,[6] the Minnesota Supreme Court recognized that four factors should be considered when asked to modify a prehearing order:

---

state with particularity the grounds therefor, and shall set forth the relief or order sought." *See* Minn. R. 1400.6600. For this reason, the Licensee was asked to put his motion in writing.

[4] In fact, the proposed stipulation of facts drafted by the A&GED and provided to the Licensee by letter dated June 1, 2000 (attached to the Licensee's reply memorandum) does not include a stipulation concerning whether the machines lacked date stamps.

[5] 343 N.W.2d 645 (Minn. 1984).

[6] *Id*. at 649.

1. the degree of prejudice to the party seeking the modification;
2. the degree of prejudice to the party opposing the modification;
3. the impact of the modification at that stage of the litigation; [and]
4. the degree of willfulness, bad faith or inexcusable neglect on the part of the party seeking modification.

It is appropriate to consider and balance these factors in deciding whether it is appropriate to modify the discovery period established in the First Prehearing Order.

Considering the first two factors, it is apparent that the prejudice to the Licensee would be significant if he is unable to ascertain more about the A&GED's case against him prior to the hearing. To date, he apparently has only received a short investigative summary from the A&GED. There is much at stake in this proceeding, since the Licensee's livelihood is involved and he could face fines and criminal prosecution. The prejudice to the A&GED would be slight if the modification is made, since responses to the discovery requests served by the Licensee presumably could be accomplished in a fairly expeditious fashion.

With respect to the third factor, modification of the discovery schedule will have little impact on this contested case proceeding. If the discovery responses are required to be completed in less than the usual thirty days' time, it will not be necessary to change the July 10 hearing date and both parties will have sufficient time to prepare for the short (one-day) hearing contemplated in this case.

With respect to the fourth factor, it does appear that there has been a lack of diligence on the part of the Licensee's attorney, as reflected in the fact that he did not seek to interview witnesses or exchange documents until shortly before the April 21 discovery deadline and did not serve any formal discovery requests prior to that deadline. The Administrative Law Judge is hesitant to punish the Licensee for his counsel's possible lack of diligence, particularly where the Licensee's occupation is at risk. Although the Administrative Law Judge is not convinced, despite the Licensee's arguments, that preparation for an evidentiary hearing requires more thorough discovery than preparation for cross motions for summary disposition, it is conceivable that counsel might decide that extensive discovery is unnecessary if he believes that there is no dispute as to the relevant facts and the case will be decided as a matter of law on motions for summary disposition. Toward the end of the discovery period, it is evident that Licensee's counsel became aware that the parties would not be able to enter into fact stipulations in certain key areas and thus were not in agreement on all of the underlying facts. Since late April, the Licensee's attorney has been diligent in seeking additional time for discovery. The 45-day period selected at the first prehearing conference was fairly short and clearly was based upon the parties' then-belief that they were in agreement on the underlying facts and could proceed directly to summary disposition motions. If the parties had known at the

first prehearing conference that facts were in dispute and had requested a lengthier discovery period (e.g, ninety days), that request would have been granted.

Accordingly, the Judge concludes that, balancing all of the factors to be considered under *Cotroneo*, it is consistent with the interests of justice to allow an extended discovery period under the circumstances of this case, particularly because it is not anticipated that the hearing date will be affected by the additional discovery. The discovery period will be extended to June 23. The First Prehearing Order is amended to reflect this new discovery deadline.

The Licensee's discovery requests to the A&GED thus will be permitted. The A&GED is directed to respond to the requests by June 23, 2000. The Licensee's Motion to Compel is not properly considered at the present time.[7] If any particular request is viewed by the A&GED as overbroad, irrelevant, or requesting privileged material, the A&GED is directed to note its objection but thereafter respond to the request to the extent possible (i.e, define a relevant time period and supply information relating to that period; limit the response to areas agreed to be relevant; and provide non-privileged information responsive to the requests). If the Licensee wishes to file a Motion to Compel concerning these responses, he must do so by June 26. The response of the A&GED to any such motion shall be filed by June 29, and an expedited decision shall be issued.

Before concluding, it is necessary to respond to one additional point raised in the Licensee's motion papers. The Administrative Law Judge has <u>not</u> ruled that an evidentiary hearing must be held on the entire 524 counts.[8] If the parties are able to stipulate as to the facts underlying one or more counts and the only issue is the legal issue of whether sales were made in violation of the Licensee's license or applicable law and, if so, what the remedy should be, that count could be submitted to the Administrative Law Judge for decision without the

---

[7] Because the First Prehearing Order's discovery deadline of April 21 had not previously been ordered modified, the A&GED had the right to refuse to answer the Licensee's discovery requests served after that deadline. While the present Ruling enlarges the discovery period, it does not purport to rule on the propriety of each of the Licensee's discovery requests. In addition, because neither party focused in more than a general way upon the specific discovery requests served by the Licensee and the A&GED has not refused to answer any particular request at this stage, the Motion to Compel is not ripe for consideration.

[8] It is not clear why counsel for the Licensee asserts in his motion papers that summary judgment would be appropriate as to counts 1-481, complains of the State's failure to move for summary disposition, and states that "Respondent is ready, willing, and able to submit to summary disposition." Memorandum in Support of Motion at 3. Under the First Prehearing Order, either party was entitled to bring a motion for summary disposition; the Licensee was not required solely to respond to a motion filed by the A&GED. If the Licensee wished to file a summary disposition motion as to certain of the counts, he thus would have had every right to do so. During the May 2 telephone conference call, however, neither of the parties expressed any intention to file a motion for summary judgment, either as to a portion of the case or the entire case. As discussed above, the parties may, before or during the hearing, stipulate as to the facts underlying one or more counts and submit those counts for decision by the Administrative Law Judge based solely on post-hearing argument.

presentation of further evidence. Of course, argument on the legal issue could be argued in counsel's post-hearing briefs.

B.L.N.